Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1946

JAMES MORAN,

Petitioner,

vs.

GOULD CORPORATION and NATIONAL LABOR RELATIONS BOARD,

Respondents.

SUPPLEMENTAL APPENDIX FOR PETITIONER

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TABLE OF CONTENTS

Page

Judgment United States Court of Appeals for the Third Circuit 1a

Petition for Rehearing En Banc 3a

Decision of the National Labor Relations Board 5a

JUDGMENT UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2220

GOULD INCORPORATED,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

JAMES MORAN,

Intervenor

Before: Aldisert and Weis, Circuit Judges, and Diamond District Judge.*

THIS CAUSE came on to be heard upon a petition filed by Gould Corporation to review an order of the National Labor Relations Board, directed against said petitioner, its officers, agents, successors, and assigns on August 25, 1978, and upon the Board's cross-application to enforce said order. The Court heard argument of respective counsel on August 8, 1979, and has considered the briefs and transcripts of record filed in this cause. On December 27, 1979, the Court being fully advised in the premises, handed down its opinion denying enforcement of the Board's order. In conformity therewith it is hereby

Judgment

ORDERED AND ADJUDGED by the United States Court of Appeals for the Third Circuit that the cross-application for enforcement of said order of the National Labor Relations Board in said proceeding be, and it hereby is denied.

DATED: February 25, 1980

By the Court

s/ Aldisert J
Circuit Judge

* Honorable Gustav Diamond of the United States District Court for the Western District of Pennsylvania, sitting by designation.

PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2220

GOULD CORPORATION,

Petitioner

v.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent

JAMES MORAN,

Intervenor

Present: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*,* and DIAMOND, *District Judge*.**

The petition for rehearing filed by Intervenor in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Petition

By the Court,

s/ Aldisert
Judge

Dated: March 14, 1980

* Judge Rosenn did not participate in the consideration of this matter.

** Honorable Gustave Diamond, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

DECISION OF THE NATIONAL LABOR RELATIONS BOARD

August 25, 1978

DECISION AND ORDER

On November 18, 1977, Administrative Law Judge Ralph Winkler issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed cross-exceptions and briefs, and Respondent filed a brief in response to the cross-exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

The collective-bargaining contract has a no-strike clause and requires union officers to "use every reasonable effort to terminate such unauthorized action." Union Steward Moran joined a 2-hour work stoppage in support of a grievance, but he neither instigated nor led the stoppage.

Respondent discharged Moran, but none of the other employees, for violating the no-strike clause. Respondent denied the Union's request for mitigation because of a previous verbal warning to Moran in connection with a 1973 stoppage. For details, Respondent referred to a February 1976 letter, advising the union president that Moran had "repeatedly violated the procedures established (contractually) for resolving disputes." The letter noted that, in addition to participating in a 1973 stoppage, Moran had filed charges with OSHA, EEOC, and NLRB, without first using agreed-upon procedures. An internal progress report regarding the discharge states that as a shop steward Moran has a "particular obligation to observe the [contract]," which he did not do during the most recent stoppage nor in his "past actions" as an employee and shop steward.

The Administrative Law Judge concluded that Respondent violated Section 8(a)(3) because its discipline of Moran was based on Moran's union status rather than on his conduct as an employee. He relied

on *Precision Castings Company*, 233 NLRB 183 (1977), wherein the Board found unlawful the employer's disciplining of only the union stewards following an unauthorized stike, admittedly because as stewards they participated in the strike rather than urging other employees to return to work. He also concluded that Respondent violated Section 8(a)(4), evidenced by the content of the internal progress report. We agree.

One of our dissenting colleagues dismisses as a "simplistic approach," and the other chooses to ignore, the fundamental axiom of our national labor policy: an individual cannot be discriminated against becuase of his union status. Arguing that an individual may be discharged for violating a contract provision while acting in his position as union steward begs the question. Here the steward acted in concert with approximately 50 other employees, but was singled out for discipline solely because he was the steward. He was discharged not because of his actions as an employee, but because of his lack of actions as a steward, a legally impermissible criterion for discipline under the Act, and one which is not validated by a contract clause that specifies the responsibilities of union officers while acting as union officers. The contract is binding between the Employer and the union, but does not grant the employer the power to enforce it by discharging union officials. The employer's recourse is against the union entity rather than against the individuals who serve the unit by holding union office. Employer self-help against individual union officials for a union's breach of contract can only undermine the peaceful settling of disputes and clears a path for employer intervention in a union's internal affairs in a way that is specifically barred to unions in the corollary situation by Section 8(b)(1)(B), which prohibits restraint or coercion of an employer in the selection of his representatives for collective bargaining or adjusting grievances.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Re-

lations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Gould Corporation, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

MEMBER TRUESDALE, concurring in part and dissenting in part:

In agreement with the majority, I would affirm the finding of the Administrative Law Judge that Respondent unlawfully relied on Moran's prior complaints to various Government agencies in justifying its decision to discharge him after the unauthorized work stoppage. Just as a labor organization may not, through removal, discipline a steward who seeks relief from the Board or other Government agencies outside the contractual grievance procedure,[1] so an employer may not, through discharge, discipline a steward who engages in the same activity. For this reason, I would find that, by discharging Moran, Respondent violated Section 8(a)(1) and (4) of the Act.

However, in disagreement with the majority, I would not find that Respondent violated Section 8(a)(3) of the Act and would therefore dismiss that portion of the complaint. The record shows that, under the collective-bargaining agreement, "any employee or employees, either individually or collectively, who shall cause or take part in any illegal, unauthorized, or uncondoned strike, work stoppage, interruption or impeding of work during the life of this Agreement, may be disciplined or discharged by the Company." Furthermore, Moran, as steward, was obligated under the collective-bargaining agreement to "immediately order [Union] members to return to work," to "refuse to aid or assist in any such unauthorized action," and to "use every reasonable effort to terminate such unauthorized action."

There is no question that Moran not only failed to take any steps to end the unauthorized work stoppage, but in fact actively encouraged its continuation. I believe the majority would agree that, under

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[1] *General American Transportation Corporation*, 227 NLRB 1695 (1977); *Amalgamated Meat Cutters (National Tea Company)*, 181 NLRB 773 (1970).

the collective-bargaining agreement, any employee other than a union officer who acted as Moran did could be discharged by Respondent. I would further find that Moran's status as a steward does not shield him from the consequences which would be visited on any other employee, and would therefore find that Respondent did not act unlawfully in discharging this employee, who violated the contractual no-strike provision and encouraged his coworkers to do the same.

In finding a violation, the Administrative Law Judge relied on *Precision Castings Company,* 233 NLRB 183 (1977). I disagree with the holding of that case because, in my judgment, it is not sound either as a matter of law or as a matter of policy. With regard to the former, the Board, in finding a violation in *Precision Castings,* cited *Pontiac Motors Division, General Motors Corporation,* 132 NLRB 413, 415 (1961), a case which is factually distinguishable. In *Pontiac Motors,* the union official involved "neither caused nor took part in the work stoppage" for which he was disciplined. Accordingly, the Board's decision in *Precision Castings* is without any clear precedent.

More importantly, it is well established that an employer faced with an unprotected strike in the face of a no-strike clause need not discharge or otherwise discipline all employees who participate. *California Cotton Cooperative Association, Ltd.,* 110 NLRB 1494 (1954); *McLean Trucking Company,* 175 NLRB 440, 450–451 (1969); *Chrysler Corporation, Dodge Truck Plant,* 232 NLRB 466 (1977). The majority's position would appear to say that the employer can, of course, discipline all unlawful strikers, but if it chooses to discipline only some of them, the "mix" had better include rank-and-file employees as well. As noted, I do not believe that an employee's position in the union should provide a basis for insulating that employee from otherwise legitimately imposed discipline for engaging in unprotected activity.

Furthermore, where, as here, the Union has bound itself and its agents contractually to take affirmative steps to end any work stoppage, I would find that it is not unlawful for Respondent to discipline an agent of the Union who has instead taken steps to prolong the stoppage. To hold otherwise would render mean-

ingless the Union's clear and unmistakable contractual commitment to "use every reasonable effort to terminate such unauthorized action." For the Union has committed itself—presumably as a contractual *quid pro quo*—not only not to condone unauthorized work stoppages by the employees, but also to do everything in its power to end such stoppages immediately. Were we to find that the discharge of the steward here for leading the unauthorized strike was discriminatory under the Act, we would undermine the Union's commitment, contrary to the national policy favoring the peaceful resolution of labor disputes.

For all these reasons, I would overrule *Precision Castings, supra,* on which the Administrative Law Judge relied.

Finally, it is important to note what this case does *not* involve. Unlike our recent decision in *Owens Corning Fiberglas Co.,* 236 NLRB No. 32 (1978), this case does not concern a union steward who was singled out and disciplined for engaging in conduct which had been condoned for years when engaged in by rank-and-file employees. Rather, it concerns a steward who, contrary to his contractual obligation as a representative of the Union, abetted an unauthorized work stoppage despite the fact that the grievance to which the protest related was then being processed through legitimate contractual channels.[2]

For the above reasons, I would dismiss that portion of the complaint alleging a violation of Section 8(a)(3) of the Act.

MEMBER PENELLO, dissenting:

For the second time in the past 6 months, my colleagues of the majority have decided that an employer may not lawfully discharge a union steward who participates in an unauthorized illegal work

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[2] Similarly, in *Super Valu Xenia, a Division of Super Valu Stores, Inc.,* 228 NLRB 1254 (1977), the Board upheld an Administrative Law Judge's finding that the respondent in that case had not violated the Act by disciplining and discharging stewards who joined an unauthorized work stoppage in derogation of their responsibilities as stewards. I would find *Super Valu* controlling in both *Precision Castings* and the instant case.

stoppage and who fails to fulfill his responsibilities and duties under the collective-bargaining agreement. In their extraordinarily simplistic approach to the problem, the majority opinion in the instant case, as well as the decision in *Precision Castings Company*, 233 NLRB 183 (1977), on which they rely, completely ignores the following relevant factors: (1) that Union Steward Moran was discharged not *solely* because he was a union steward, but rather because in his position as a union steward he failed to fulfill his affirmative duties under the collective-bargaining agreement to end the illegal work stoppage; (2) that to violate Section 8(a)(3) of the Act, a discriminatory discharge must not only be union-related, but must also have as its purpose the encouragement or discouragement of union membership; and (3) that the fundamental importance of the grievance-arbitration system and its companion no-strike agreement to the peaceful settlement of labor-management disputes, as mandated by Congress, applied by the courts and the Board, and consistently interpreted by a long line of arbitral authority, will be seriously undermined by their decision. For these reasons, as fully discussed below, I vigorously dissent from the majority's opinion in the instant case, and I would dismiss the complaint in its entirety.

The basic facts are not in dispute. Respondent has had a long collective-bargaining history with the Union. The alleged discriminatee, James P. Moran, was elected a union shop steward in 1971. At the time of his discharge, he was the steward on the "B" shift (4 p.m. to 12:30 a.m.) representing employees on the first and third floors. Moran's immediate supervisor was Foreman Roger Scott.

Several days before his discharge, Moran had filed a grievance concerning the performance of alleged contract-unit work (expediting) by a supervisor. Although Respondent had a prescribed time within which to respond, the period was extended by the Union at Respondent's request. However, a number of employees were concerned about the grievance and, without waiting for management's response, approximately 50 third-floor employees engaged in an unauthorized work stoppage by congregating in the timeclock area from about 4 until 6 p.m. on October

13, 1976. After the employees had ceased work for about 30 minutes, Scott asked Moran to return to his work area, but Moran replied that "I'm not going back to work until we get an expediter." Shortly thereafter, Scott stood in front of the assembled employees near the timeclock and asked them to return to work. Moran, who was standing next to Scott in front of the assembled employees, stated for all to hear that he was taking his coffeebreak, that all the other employees were entitled to do the same thing, and that "we aren't going back to work until we find out what's going to happen [on the 'expediting' grievance]." The work stoppage finally ended through the efforts of Union Representatives Brennan and Hannings.

On October 19, Respondent notified Moran that he was terminated effective October 21 for "violation of Article XVI of the collective bargaining agreement." [3] Moran was the only employee discharged for the October 13 work stoppage.

The Union filed a grievance concerning Moran's discharge. At a fourth-step grievance meeting, the Union inquired as to whether Respondent would consider a reduction or mitigation of Moran's discharge. Respondent's director of industrial relations, Jeffrey Panciera, refused to reduce the discharge because of Moran's prior participation as a union steward in a 1973 work stoppage. Panciera then referred to a letter dated February 18, 1976, which was written by Respondent to the Union concerning Moran, in which Respondent complained about Moran's involvement in a 1973 work stoppage. The letter stated

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[3] According to art. XVI, sec. 1, of the collective-bargaining agreement, "the Union agrees that it shall not call, sanction, or engage in any strike, slowdown or stoppage of work." Sec. 2 states that "any employee or employees, either individually or collectively, who shall cause or take part in any illegal, unauthorized, or uncondoned strike, work stoppage, interruption or impeding of work during the life of this Agreement, may be disciplined or discharged by the Company." Finally, sec. 3 states that in the event of an unauthorized work stoppage, the Local, its officers, and its representatives must "order its members to return to work," "refuse to aid or assist. . .the unauthorized action," and "use every reasonable effort to terminate such unauthorized action."

that Moran was verbally warned that he could be discharged for again engaging in an illegal work stoppage. The Union then requested that Panciera read the rest of the letter, which complained about Moran's repeatedly going outside of the contractual procedures for resolving disputes, such as his filing complaints with the EEOC, OSHA, and NLRB without utilizing or exhausting the agreed-upon contractual procedures for resolving such disputes. The conduct described in the February 18 letter was based on Moran's status as a union steward and that Moran was particularly bound by such status to administer the collective-bargaining agreement. The letter specifically stated, however, that "his rights to take such individual actions, as an employee, are not in question." Respondent in the February 18 letter did not threaten to discipline Moran for his activities, but merely requested that the Union advise Moran of his duties under the collective-bargaining agreement.

Based upon the evidence above, the Administrative Law Judge concluded that Moran's discharge for willfully failing the responsibility of his union position was clearly union-related and, thus, it violated Section 8(a)(3) and (1) of the Act. The Administrative Law Judge relied solely on the Board's recent decision in ***Precision Castings Company, supra,*** to support his conclusion.[4] In addition, the Administrative

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[4] The facts in *Precision Castings Company* are strikingly similar to the facts in the instant case. Five union stewards were suspended for failing to abide by their contractual responsibility to take all reasonable steps to terminate an unauthorized work stoppage which violated a contractual no-strike clause. The suspended stewards had not been active in calling or conducting the strike, although they had clearly participated in it. A panel of Chairman Fanning and Members Jenkins and Murphy reversed the Administrative Law Judge's finding that the respondent had lawfully invoked its right under the no-strike clause of the contract to suspend the five union stewards. According to the panel, the respondent was free to discipline anyone as long as the criterion was not "union related." Since the respondent admitted that the reason for suspending the five union stewards was because of their position in the union and their failure to urge the strikers to return to work, the panel concluded that such conduct was "discrimination directed against an employee on the basis of his or her holding union office [which] is contrary to the plain meaning of section 8(a)(3) and would frustrate the policies of the Act if allowed to stand."

Law Judge concluded that Moran's discharge was motivated in part by Moran's having filed charges or complaints with the EEOC, OSHA, and NLRB, and, thus, Respondent violated Section 8(a)(4) of the Act as well.

The fallacy in the rationale employed by my colleagues in the present case, as well as in *Precision Castings,* is painfully obvious even to the unsophisticated observer. In the simplified view of the majority, the Employer in the instant case, as well in *Precision Castings,* singled out the union stewards from among all the employees for discipline *solely* because they were stewards. However, the majority overlooks the crucial fact that the stewards in both cases were *not* disciplined *solely* because they were union stewards, but rather because they had failed to fulfill the duties required of a union steward under the collective-bargaining agreement to take all reasonable steps necessary to end an unauthorized, illegal work stoppage. In the instant case, the collective-bargaining agreement specifically requires that, in the event of an illegal work stoppage, union stewards must use every effort to get the employees back to work and to refuse to aid or assist the work stoppage. Moran did absolutely nothing to end the work stoppage and, in fact, he affirmatively aided and assisted the stoppage by his statements in front of all of the striking employees.

In addition to this erroneous factual finding, the majority's application of Section 8(a)(3) of the Act is incorrect as well. One of the most firmly established principles of labor law states that, for a discharge to be found discriminatory under Section 8(a)(3) of the Act, there must be proof that the discrimination had as its purpose the encouragement or discouragement of union membership.[5] There has been no such showing in the instant case, nor in *Precision Castings.* Rather, the employer in both cases was merely attempting to enforce a valid collective-bargaining agreement by disciplining those employees who had violated specific provisions of such agreement. The employer's action in both cases was for the purpose

[5] *See The Radio Officers' Union of the Commercial Telegraphers Union v. N.L.R.B.,* 347 U.S. 17 (1954).

of encouraging the process of collective bargaining as well as the goal of peaceful labor-management relations, an object which my colleagues would surely agree is not prohibited by Section 8(a)(3) of the Act.

The practical effect of the majority's opinion is quite disturbing, to say the least. According to the majority's analysis, an employee who becomes a union steward acquires a battery of *benefits* and *protections* without an iota of *burdens or responsibilities* in return. For I am certain that my colleagues would not question the accepted principle that union stewards who are engaged in the processing of grievances may engage in conduct which otherwise would be unprotected by the Act.[6] Nor would they dispute the principle that the maintenance and enforcement of a clause in a collective-bargaining agreement granting union stewards superseniority for the purposes of layoff and recall over the rest of the employees in the bargaining unit is lawful.[7] Such benefits or protections are granted *solely* because of the employee's position in the union and for the purpose of properly administering the collective-bargaining agreement. However, when a union steward is disciplined because he has improperly administered the collective-bargaining agreement by failing to fulfill a *duty* inherent in his position and which would not exist *but for* his union position, my colleagues are quick to find a violation on the part of the employer.

The majority's rationale is clearly inconsistent and illogical on its face. In addition, their conclusion that union stewards are under no affirmative duty to enforce a no-strike clause of a collective-bargaining agreement completely ignores the crucial significance of the grievance-arbitration procedure and its companion no-strike clause to the proper administration of the collective-bargaining agreement, as mandated by Congress in the National Labor Relations Act, as applied by the courts and the Board, and as consis-

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[6] *Crown Central Petroleum Corporation*, 177 NLRB 322 (1969); *Thor Power Tool Company*, 148 NLRB 1379 (1964).

[7] *Auto Warehousers, Inc.*, 227 NLRB 628 (1976); *Dairylea Cooperative Inc.*, 219 NLRB 656 (1975).

tently interpreted by a long line of arbitral authority.

The grievance-arbitration, no-strike trade-off received its initial impetus from Congress in Sections 201(c) and 203(d) of the National Labor Relations Act, as amended. In those sections, Congress encouraged the "final adjustment by a method agreed upon by the parties . . . to be the desirable method for settlement of grievance disputes arising over the application of an existing collective-bargaining agreement." [8] The Supreme Court has acknowledged this mandate from Congress in its interpretation and application of Section 301 of the Act. In *Textile Workers Union of America, AFL-CIO* v. *Lincoln Mills of Alabama,*[9] the Supreme Court held that grievance-arbitration agreements are enforceable in Federal courts under Section 301 of the Act. The Court in *Lincoln Mills* recognized that "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike," relying heavily on the legislative history behind the congressional enactment of Section 301 that:

> If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.[10]

The Supreme Court reaffirmed the crucial importance of the grievance-arbitration, no-strike trade-off

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[8] National Labor Relations Act, as amended, Sec. 201(c). *See Fishman & Brown, Union Responsiblity for Wildcat Strikes,* 21 Wayne L. Rev. 1017 (1975).

[9] 353 U.S. 448 (1957).

[10] *Id.* at 454.

in the *Steelworkers Trilogy,*[11] stating that, to completely effectuate the Federal policy of promoting industrial peace, the collective-bargaining agreement should contain "both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the *'quid pro quo'* for the agreement not to strike."[12]

Today, the enforceability of the grievance-arbitration clause against the employer and the no-strike clause against the union are firmly established under Federal law. Thus, when an employer is confronted by a work stoppage which violates a contractual no-strike provision of a collective-bargaining agreement, it has a number of legal avenues to pursue. In order to get the employees back to work as quickly as possible, the employer may seek an injunction under Section 301 of the Act. If it is possible to determine the extent to which the employer has been damaged monetarily by the work stoppage, the employer may sue the union for such damages under the same section. However, if the work stoppage is clearly unauthorized by the union, as in the instant case, and the union has done everything in its power to end the work stoppage, the employer's remedies are much more limited. In such a case, the employer's ability to discipline those employees who participated in the illegal work stoppage is of paramount importance. The Seventh Circuit Court of Appeals recognized this in *Sinclair Oil Corporation* v. *Oil, Chemical and Atomic Workers International Union,*[13] in which it held that union members who breach the no-strike clause of a collective-bargaining agreement in defiance of their union leaders are not individually liable for damages under Section 301 of the Act. According to the court,

> If there is one principle that is universally recognized in the field of industrial relations, it is that shop stewards have the highest duty to

[11] *United Steelworker v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[12] *United Steelworkers v. Warrior & Gulf Navigation Co., supra,* at 578, fn. 4.

[13] 452 F.2d 49 (1971).

> Congress, in the debates over Section 301, explictly considered the problem of wildcat strikes and possible remedies. The remedies suggested were discharge and discipline. There is no indication that Congress considered Section 301 itself a remedy for an aggrieved employer. . . . We consider that the primary remedy of Sinclair is discharge or discipline of individual defendants.[14]

Thus, the court in *Sinclair Oil* recognized that the primary remedy of an employer when confronted by an unauthorized, illegal work stoppage is the discipline of individual employees who participated in the strike. However, since it is unreasonable to expect or require an employer to discharge or discipline every employee who participated in an illegal strike, a long line of arbitration decisions has established that an employer may selectively discharge wildcat strikers, especially the leaders of such strikes.[15] In affirming the employer's right to selectively discharge strike leaders, arbitrators have characterized the duty of the union steward to prevent or terminate illegal work stoppages in the following manner:

> faithfully adhere to all of the provisions of the collective bargaining agreement and to actively instruct each employee to do so as well. While it is improper for an ordinary employee to deliberately breach the Agreement, a similar act by a shop steward is untenable and grounds for his discharge. It is the obligation of the steward to set an example for all Union members within his jurisdiction by demonstrating his loyalty to the

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[14] *Id.* at 54.

[15] *Litton Systems, Inc.*, 71-1 ARB #8215 (1971) (Abernethy, Arb.); *McGough Bakeries Corporation*, 68-1 ARB #8264 (1967) (Eyraud, Arb.); *Barbetta Restaurant*, 42 L.A. 951 (1964) (Wolff, Arb.); *General American Transportation Corp.*, 42 LA 142 (1964) (Pollack, Arb.). *See* Spelfogel, *Wildcat Strikes and Minority Concerted Activity—Discipline, Damage Suits and Injunctions*, 24 Lab.L.J. 592, 608 (1973); Unkovic, *Enforcing the No-Strike Clause*, 21 Lab.L.J. 387 (1970); Handsaker, *Arbitration and Discipline for Wildcat Strikes*, 14 Lab.L.J. 395 (1963).

> terms and conditions of the contract negotiated by his Union with the Employer. . . . [A] shop steward's duty in the face of an unauthorized work stoppage is well settled. Not only should he make a determined effort to prevent the stoppage before it begins, but upon its development [he] must actively and unequivocally attempt to bring an end of the stoppage at the earliest possible moment.[16]

Although the Board is clearly not bound by such arbitral authority, we would be ignoring the teachings of the Supreme Court in the *Trilogy* were we to disregard the "common law of the shop" that union stewards have affirmative duties under the collective-bargaining agreement, and that they may be discharged for failing to fulfill such duties. I can see no reason why duties which are consistently recognized by the interpreters of the collective-bargaining agreement should not also be recognized by the Board in its interpretation of the National Labor Relations Act.

In fact, in a series of cases going as far back as 1949, the Board has taken the position that union stewards have a greater duty than rank-and-file employees to uphold the provisions of a collective-bargaining agreement, especially the no-strike clause of such an agreement.[17] The Board has also held on several occasions that "[a]n employee who attempts to persuade fellow employees to strike in violation of a contractual no-strike clause or commit acts of insubordination is not insulated from discipline by the mere fact of his holding union office."[18] And in a

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[16] *United Parcel Service, Inc.*, 47 LA 1100-01 (1966) (Schmertz, Arb.).

[17] *Riviera Manufacturing Co.*, 167 NLRB 772 (1967); *University Overland Express, Inc.*, 129 NLRB 82 (1960); *Stockham Pipe Fittings Company*, 84 NLRB 629 (1949).

[18] *Stop & Shop, Inc.*, 161 NLRB 75, 79 (1966); *See Super Valu Exenia*, 228 NLRB 1254 (1977); *Anaconda Aluminum Company*, 197 NLRB 336 (1972); *J.P. Wetherby Construction Corp.*, 182 NLRB 690 (1970); *A. Borchman and Sons Co.*, 174 NLRB 203 (1969); *Russell Packing Company*, 133 NLRB 194 (1961).

very recent decision issued by the same panel as that in ***Precision Castings Company*** (Chairman Fanning and Members Jenkins and Murphy), the Board adopted an Administrative Law Judge's Decision in which a union steward was found to have been lawfully discharged for his participation in an unauthorized, illegal work stoppage because the union steward's active participation made him the natural leader of the work stoppage and thus justified his discharge.[19]

In cases in which the Board has found *unlawful* the discharge of a union steward who had been involved in an illegal work stoppage, it was specifically found that: (1) the steward did *not* participate in the strike; [20] (2) the steward had no contractual duty to prevent the strike or bring it to an end; [21] or (3) the steward had in fact fulfilled his contractual duty to prevent the strike or to get the employees back to work.[22]

In the instant case, the collective-bargaining agreement places a number of affirmative duties on the union steward in the event of an unauthorized, illegal work stoppage. The steward is required to order the employees back to work, to refuse to aid or assist the employees, and to use every effort to bring the stoppage of work to a conclusion. Yet, when the employees refused to work on October 13, Moran stood next to Foreman Scott in front of the assembled employees and stated that "we aren't going back to work until we find out what's going to happen [on the expediting grievance.]" In addition, Moran specifically refused a request by Scott to return to work. The work stoppage lasted for 2 hours and did not end until two other union representatives interceded, further indicating that Moran did nothing to bring the

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[19] *Chrysler Corporation, Dodge Truck Plant*, 232 NLRB 466 (1977).

[20] *General Motors Corporation*, 218 NLRB 472 (1975); *Pontiac Motors Division, General Motors Corporation*, 132 NLRB 413 (1961).

[21] *Morris-Knudsen Company, Inc.*, 210 NLRB 174 (1974).

[22] *Wagoner Transportation Company*, 177 NLRB 452 (1969).

work stoppage to a conclusion. Thus, the record is clear that Moran willfully failed to fulfill the three specific duties required of a union steward in the event of a work stoppage. As a result, Respondent lawfully discharged Moran pursuant to article XVI of the collective-bargaining agreement, and thus did not violate Section 8(a)(3) of the Act.

In addition to their finding that Respondent violated Section 8(a)(3) of the Act by discharging Moran, my colleagues of the majority have adopted the Administrative Law Judge's finding and conclusion that Respondent violated Section 8(a)(4) of the Act as well. The Administrative Law Judge based his finding on a "Progress Report," completed by Respondent at the time of Moran's discharge, in which it is stated that "as a result of Mr. Moran's actions in this case, and in light of Mr. Moran's past activities as an employee and a Shop Steward which indicate repeated violations of the collective bargaining agreement, other Agreements and Company policy, Mr. Moran will be discharged effective October 21, 1976." Since there is absolutely no mention of Moran's having filed charges with the EEOC, OSHA, and NLRB in the "Progress Report," I am at a loss to understand the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(4) of the Act. The only conceivable explanation is that the Administrative Law Judge incorporated the February 18 letter into the "Progress Report" in order to reach the conclusion that Respondent relied in part on the filing of charges by Moran when it discharged him following the work stoppage. Although such a conclusion is rather strained, to say the least, it is completely contradicted by the following facts.

The February 18 letter was sent by Respondent to the Union in order to complain about repeated violations of the collective-bargaining agreement by Moran. Respondent cited five specific instances in which Moran's "actions as a shop steward were entirely inappropriate, if not in absolute violation of the collective bargaining agreement." The only time that the February 18 letter was brought up in regard to the discharge of Moran was during the fourth-step grievance meeting. At that meeting, the Union requested that Respondent reduce or mitigate the discharge of

Moran. Respondent refused, citing Moran's previous involvement in an illegal work stoppage in 1973 and the verbal warning he was given that a recurrence of such conduct could result in his discharge. Since the February 18 letter was the only written record of the 1973 work stoppage, Respondent read that portion of the letter referring to the 1973 incident. The *Union* then requested that the entire letter be read and that they be given a copy, because they were not sure they had it in their files. It is clear that Respondent relied on Moran's having filed charges with the EEOC, OSHA, and NLRB neither when it originally discharged Moran nor when it refused to reduce his discharge. Rather, Respondent discharged Moran in October 1976 for violating the no-strike provisions of the collective-bargaining agreement and, when asked to reduce the discharge, it cited a previous violation of the contractual no-strike provision by the very same employee. The fact that the progress report issued at the time of Moran's discharge mentioned Moran's repeated violations of the collective-bargaining agreement is entirely consistent with Respondent's rationale in discharging him: namely, that Moran had continually refused for a period of over 3 years to abide by his duties as a shop steward under the collective-bargaining agreement; that the Union had repeatedly been warned of Moran's conduct; and that such conduct had been repeated by Moran when he participated in the October 13 work stoppage. Therefore, I cannot agree with my colleagues that Respondent was motivated to discharge Moran by his having filed charges with the EEOC, OSHA, and NLRB, in violation of Section 8(a)(4) of the Act.

To summarize, my colleagues of the majority have reached a decision today which contravenes the directions of Congress, the courts, prior Board decisions, and the consistent arbitral interpretation of the collective-bargaining agreement. In support of its position, the majority has taken an erroneous view of the facts and has engaged in an incorrect application of the law. As a result, the majority has endangered the very foundation of our collective-bargaining system. As noted above, no single factor contributes more to peaceful labor-management relations than the grievance-arbitration system with its companion

no-strike clause. Yet employers are being told today that, in return for their promise to submit all disputes arising under their collective-bargaining agreements to the grievance-arbitration procedure, they are getting absolutely nothing in return. For if union stewards are permitted to engage in unauthorized, illegal work stoppages and not be subject to discipline for failing to comply with their affirmative contractual duties to end such stoppages, the no-strike provision is essentially a nullity as far as the employer is concerned. Not only will industrial peace at the workplace be threatened by the specter of wildcat strikes, but the negotiation of collective-bargaining agreements will also be severely hindered as employers become less willing to concede grievance-arbitration clauses when they know that they will be getting very little in return.[23]

As a practical matter, not only will employers be adversely affected by the majority decision in the instant case and in *Precision Castings,* but unions will suffer as well. Any responsible union has a vested interest in seeing that its agreement with an employer is enforced. The most important individual to police the enforcement of the collective-bargaining agreement is the one who sees the agreement in action every single day; namely, the steward. If the steward is told that he may ignore the plain terms of the agreement and not suffer the consequences, then the efforts of any union to enforce its agreement will clearly be impeded. Since wildcat strikes are as anathema to unions as they are to employers, it is

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[23] The majority's statement that "[E]mployer self-help against individual union officials for a union's breach of contract can only undermine the peaceful settling of disputes and clears the path for employer intervention in a union's internal affairs" further indicates their complete misunderstanding of the instant case. It is precisely because the Union did not violate the contract, leaving Respondent remediless against the Union, combined with the Union's demonstrated unwillingness to take any internal action against Moran, which forced Respondent to take the only reasonable alternative of discharging him. To have permitted Moran to continue as an employee occupying the position of shop steward, despite his open defiance of Respondent, the Union, and the collective-bargaining agreement, would have had a far more disruptive effect on the stability of the collective-bargaining relationship and on the "peaceful settling of disputes" than did the actual discharge of Moran.

logical to assume that unions would be adverse to rulings which provide their stewards with a free hand to lead such wildcat strikes.

In my view, nothing is more repugnant to the purposes and policies of the National Labor Relations Act than to see the sincere efforts of management and labor, in seeking a peaceful resolution of their disputes, wasted because of the unwillingness of employee representatives to assume the burdens which go hand-in-hand with the benefits of union representation. When management and labor are forced to settle their disputes through disruptions at the workplace rather than through the orderly process of collective bargaining, we clearly fail in the goals declared by Congress when it enacted the National Labor Relations Act 43 years ago.

I vigorously dissent.

DECISION

Statement of the Case

Ralph Winkler, Administrative Law Judge: Upon a charge, a complaint issued by the General Counsel on April 20, 1977, and an answer filed by Respondent, a hearing was held in Philadelphia, Pennsylvania, on June 13–14, 1977.

Upon the entire record in the case, including my observation of demeanor of witnesses and consideration of briefs, I make the following:

Findings of Fact

I. THE BUSINESS OF RESPONDENT

Respondent Gould Corporation is a Delaware corporation engaged in the manufacture of electrical circuit breakers in Philadelphia, Pennsylvania. It is an employer within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 1612, United Automobile, Aerospace and Agricultural Implement Workers of America (the Union), is a labor organization within Section 2(5) of the Act.

Decision

III. THE UNFAIR LABOR PRACTICES

This case involves the discharge of James Moran on October 21, 1976, and the General Counsel alleges that Respondent has thereby violated Section 8(a)(1), (3), and (4) of the Act. Moran had been with Respondent since 1968 and at the time of his discharge he was employed on the B shift (4 p.m.–12:30 a.m.) on the third floor of M Building. Respondent, apparently, has had a long collective-bargaining history with the Union. Moran was elected a union shop steward in 1971 and at material times here he and Richard Jones were the only stewards on the B shift, Moran representing employees on the first and third floors and Jones representing fourth floor employees.

There are some 40–50 employees on the third floor, and these employees are paid on a bonus system. They receive jobs at the time cage on that floor and work against a time standard. If they complete an assignment more quickly than in the time allotted, they earn bonus pay. There are no official break periods and employees take their breaks at any time, usually in the vicinity of vending machines near the time cage.

Moran's immediate supervisor was Foreman Roger Scott. Thomas Kenny is also a foreman on the third floor, and John Dallmer is general foreman for the entire B shift. Jeffery Panciera is director of industrial relations for this division; his superior is Harold Strack, manufacturing manager. Strack is the management official whose decision it was to terminate Moran. Other union representatives in this case are Shop Chairman James Brennan and Frank Hannings, the chairman of the union negotiating committee. Frank Redmiles is the local union president.

Article XVI of the operative contract between Respondent and the Union provides in part as follows:

> SECTION 1. . . . the Union agrees that it shall not call, sanction, or engage in any strike, slowdown or stoppage of work; . . . .
>
> SECTION 2. Any employee or employees, either individually or collectively who shall cause or take part in any illegal unauthorized or uncondoned strike, work stoppage, interruption or impeding of work during the life of this Agreement, may be disciplined or discharged by the Company.
>
> SECTION 3. In the event of an illegal, unauthorized or uncondoned strike, work stoppage, interruption or impeding of work, the Local and International Union and its officers shall immediately take positive and evident steps to have those involved cease such activity. These steps shall involve the following:

Decision

> The Union, its officers and representatives shall immediately order its members to return to work, notwithstanding the existence of any wild-cat picket line.
>
> The Union, its officers and representatives shall refuse to aid or assist in any way such unauthorized action.
>
> The Union, its officers and representatives, will in good faith, use every reasonable effort to terminate such unauthorized action.

Respondent contends that Moran participated in a work stoppage in violation of this contract and that it discharged him for such reason. The General Counsel urges, on the other hand, that there was no work stoppage and that Moran did not participate in a stoppage even if there was one. The General Counsel further asserts that Respondent in any event discharged Moran at least in part for filing charges or complaints with the NLRB and with EEOC (Equal Employment Opportunity Commission) and OSHA (Occupational Safety and Health Administration).

In 1974, by appendixes to their existing contract, Respondent and the Union agreed to establish and thereupon did set up a Joint Occupational Safety and Health Committee and a Fair Employment Practice Committee as an internal contract mechanism for handling OSHA and EEOC-type disputes. Moran, in his steward capacity, nevertheless did thereafter complain to OSHA and file charges for employees with EEOC. He also filed a charge with the NLRB concerning his own layoff in 1975, which charge the Regional Director found to be meritless. By letter in February 1976, Panciera of Industrial Relations advised Union President Redmiles that Moran had "repeatedly violate[d] the procedures established for resolving disputes" and Panciera mentioned in this connection that Moran had taken the OSHA, EEOC, and NLRB actions without using or exhausting the parties' agreed-upon procedures for resolving disputes, and also that Moran had been purportedly warned in 1973 for his conduct as a steward in connection with a work stoppage at that time. The letter further recited, in part, that Moran's mentioned resort to OSHA, EEOC, and NLRB "represents a violation of the philosophy and intent of the parties and quite possibly an absolute violation of the collective-bargaining agreement. It is important to note that the Company's objection to these actions is based on the fact that Mr. Moran is a shop steward and, as such, is particularly bound to administer the collective-bargaining agreement and policies of the parties in a manner prescribed by the parties. His rights to take such individual actions, as an employee, are not in question."

Decision

A. *Events Concerning the Discharge*

Moran had filed a grievance concerning the performance of alleged contract-unit work (expediting) by a supervisor. Under the contract grievance procedure Respondent had a prescribed time within which to file its response. The period for response was extended, and no claim is made by the General Counsel that Respondent was delinquent so far as the timeliness of its response is concerned. Employees were restive about the grievance, and without waiting for management's response, a substantial number of third floor employees engaged in a work stoppage and congregated in the timeclock area [1] from approximately 4 to 6 p.m. on October 13, 1976. The stoppage ended through the intercession of Union Representatives Brennan and Hannings and after they had obtained a commitment that foremen would not perform the disputed expediting function.

Although Moran denied having participated in or having abetted the work stoppage, the credible testimony of Foreman Scott establishes Moran's role in that activity. In his first encounter with Moran during that period, Scott asked Moran to return to his work area and told Moran that "I [Scott] thought that [as shop steward] it was as much his responsibility as mine to help get these people back to work and if he returned to his work area that maybe the thing would break up and I could address myself to the problem." Moran, who was having coffee at the time, replied that "I'm not going back to work until we get an expeditor." When Scott shortly asked Foreman Kenny to tell his men to return to work, Moran told Scott that the employees were entitled to assemble under Federal law and that Scott had no "right" to tell the employees to go back to work. Scott then exhorted a group of employees to return to work and Moran then declared within the group's hearing, that he was taking his coffeebreak and the others were entitled to do the same thing and that "we ain't going back to work until we find out what's going to happen [on the "expediting" grievance]." Scott testified that Moran was

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[1] Based on the trustworthy testimony of Foreman Scott as well as the testimony on cross-examination of Shop Steward Richard Jones that "there wasn't much question" that a work stoppage had occurred and a prior statement by another General Counsel witness that "during the B shift. . . a large group of workers. . . stopped for 2 hours, protesting doing unit work." Needless to say, I have considered and evaluated the testimony of all witnesses on this and all other factual matters.

the single employee whom he engaged in conversation during the period in question, and he explained that he did so because of Moran's stewardship and that Moran was the person to whom he would normally speak concerning the stoppage situation. The record, however, does not establish that Moran either called or led the stoppage.

Respondent conducted an investigation of the October 13 stoppage, and Panciera recommended to Manufacturing Manager Strack that Moran be fired. Strack concurred with Panciera's recommendation and directed Moran's discharge. Moran was accordingly notified on October 19 that he was terminated, "effective October 21," for "Violation of Article XVI of the Collective-Bargaining Agreement." Strack testified that he alone made the decision to discharge Moran and that he did so after consulting with Panciera and Shop Superintendent Woods. He further testified that Moran's purported warning respecting a 1973 work stoppage and Moran's complaints and filings with OSHA, EEOC, and NLRB played no part in the discharge decision and he denied having even been aware at the time of these other actions by Moran. In this connection Strack also testified he had been unaware of the February 1976 letter from Panciera to Redmiles which, as indicated above, dealt with Moran's conduct as a shop steward in circumventing the parties' internal disputes procedures and in regard to a 1973 stoppage.

Strack testified that upon deciding to discharge Moran, he directed Superintendent Woods to prepare the necessary papers. Woods and Scott contemporaneously signed an internal progress report concerning Moran which reads in part as follows:

> In view of his actions and statements made to Company Representatives that evening, it is clear to the Company that Mr. Moran has violated the provisions of Article XVI of the Collective Bargaining Agreement. As a Shop Steward, Mr. Moran has a particular obligation to observe the provisions of the Collective Bargaining Agreement. As a result of Mr. Moran's actions in this case, and in light of Mr. Moran's past action as an employee and a Shop Steward which indicate repeated violations of the Collective Bargaining Agreement, other Agreements & Company policy, Mr. Moran will be discharged effective October 21, 1976.

Panciera testified that he did not know who had drafted the progress report and was not "sure" he had reviewed or assisted in the drafting, although he testified he might have done so.

Decision

The Union filed a grievance respecting Moran's October 21 discharge, and a fourth-step grievance meeting was held on October 25, 1976. Panciera testified that at this session the union representatives inquired whether Respondent would "downgrade" or lessen Moran's discharge and that he, Panciera, refused to do so because of Moran's participation as a steward in the 1973 stoppage. According to Panciera, he thereupon referred to the aforementioned February 1976 letter and then read the entire letter to the union representatives. Panciera testified that he referred to the letter only in connection with the Union's mitigation request and that the matters involved in this letter did not contribute to Respondent's decision to terminate Moran.

Both Respondent and the Union took notes at the grievance meeting of October 25. The Union's notes state, in part:

> Jeff Panciera, We feel after review Mr. Moran did take part in work stoppage and was in violation of Article 16 we stand on the discharge.
>
> Frank Redmiles, We put people back to work and did our job under contract. will you offer discipline.
>
> Jeff Panciera, None at all. Discharge is sustained.
>
> Frank Redmiles, on basis of your evidence? Don't jack pot us give all evidence.
>
> Jeff Panciera, We stated the essence of the case, his (Moran) actions his previous record, his constantly going out of grievance procedure, in 1973 he caused a work stoppage, he was warned the next time he would be discharged. February of this year I sent you a letter stating Mr. Moran's constant going outside facilities instead of the grievance procedure. We have been involved with Moran's abuse of the grievance procedure. (Placement grievance) he put grievance in 1st step Placement grievance have always been automatic 3rd step grievance. May 1975 Moran while grievance was in process he filed charges with E.E.O.C.
>
> August 75–Moran while grievance was in process filed charges with the N.L.R.B. against Company.
> February 76–letter sent advising Union continual violation by Moran going out of contract agreement.
> Mr. Moran's behavior distruction of Company property has a propensity to violation of the collective bargaining agreement.

Respondent's minutes were contained in a letter it sent to the Union on November 8, 1976. These minutes read, in part:

Decision

> After thorough review and discussion, the Company advised the Union that in light of Mr. Moran's actions and statements on the evening of October 13, 1976, which were contrary to the obligations of a Shop Steward and, in view of his past actions as an employee and Shop Steward which indicates repeated violations of the Collective Bargaining Agreement, other agreements, and Company Policy, the Company feels that the discharge in this case was entirely justified. (The Company also outlined Mr. Moran's past violations of the Agreement as a Shop Steward which were discussed in a letter to the Union dated February 18, 1976, copy attached, as well as Mr. Moran's record as an employee.) Therefore, the Company sustained its position and the discharge will stand.

Moran thereafter filed a claim for unemployment compensation with the Bureau of Employment Security. By letter of November 16, 1976, Respondent advised the Bureau, in part, as follows:

> Mr. Moran was discharged by his department supervision on October 21, 1976, for violation of Article XVI of the Collective Bargaining Agreement between the Company and Local 1612, UAW. This Article specifies, in part, the obligations of employees and union representatives regarding work stoppages, and the consequences of causing or participating in such actions.
>
> Mr. Moran was a union representative at the time the action in question occurred, and he did participate in a work stoppage on October 13, 1976, in violation of the provisions of that Article. As a Union representative, he had a clear responsibility under that article, and his failure to fulfill that responsibility resulted in his discharge.

B. *Concluding Findings*

The record preponderantly establishes that Moran and other third floor employees engaged in a work stoppage on October 13.[2] This violation of the no-strike contract is generally unprotected conduct and Respondent asserts that it was therefore entitled, without liability, to "pick and choose" in disciplining employees for participating in the misconduct. But this "freedom to discipline anyone re-

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[2] However, *see United Merchants and Manufactures, Inc. v. N.L.R.B.*, 554 F.2d 1276 (C.A. 4, 1977).

mained unfettered [only] so long as the criteria employed were not union-related." *Precision Castings Company*, 233 NLRB 183 (1977).

In the *Precision Castings* case, five union stewards joined in an unauthorized strike in breach of a valid contract provision. The employer disciplined the stewards, but no other strikers, the admitted reason for their selection being their shop steward position and their failure to urge the other strikers to give up the strike. Noting that "under the terms of the contract" the stewards "could assertedly be held to a greater degree of accountability for participating in the strike," the Board concluded that the discipline given them was nevertheless violative of the Act. The Board thus explained that "discrimination directed against an employee on the basis of his . . . holding union office is contrary to the plain meaning of Section 8(a)(3) and would frustrate the policies of the Act if allowed to stand."

Shop Steward Moran also had a greater degree of responsibility under the instant contract, and Respondent acknowledged to the Bureau of Unemployment and I find that he was selected for discharge because he willfully failed the responsibility of his union position. Under *Precision Castings*, this basis for discipline is itself unlawfully discriminatory. The record establishes, moreover, that discharge decision. Thus, Respondent's own progress report plainly shows and I find that Respondent's decision to discharge Moran was affected or motivated, in part, by the fact that Moran had filed charges with or complained to EEOC and OSHA,[3] and also because he had filed a charge with the NLRB.[4]

Conclusions of Law

1. Respondent is an employer within Section 2(6) and (7) of the Act.
2. The Union is a labor organization within Section 2(5) of the Act.
3. By discharging Moran, Respondent has violated Section 8(a)(1), (3), and (4) of the Act.
4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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[3] *Air Surrey Corporation*, 229 NLRB 1064 (1977); *Wray Electric Contracting, Inc.*, 210 NLRB 757 (1974); *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975); *King Soopers, Inc.*, 222 NLRB 1011 (1976); *Advance Carbon Products, Inc.*, 198 NLRB 741 (1972).

[4] *General Services, Inc.*, 229 NLRB 940 (1977); *The Howard P. Foley Company*, 229 NLRB 1167 (1977); *Globe Manufacturing Company*, 229 NLRB 1025 (1977).

Decision

THE REMEDY

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1), (3), and (4) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action, including reinstating Moran and making him whole, in order to effectuate the policies of the Act. All backpay computations shall be in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).)

Upon the foregoing findings, conclusions, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER [5]

The Respondent, Gould Corporation, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because they are union stewards or other union representatives or for filing charges or complaints with NLRB, OSHA, or EEOC.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights as guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer James P. Moran reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole, as set forth in "The Remedy" section, above, for any loss of earnings suffered as a result of the discrimination against him.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records neces-

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[5] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and the recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

sary to analyze the amount of backpay due and the right of reinstatement under the terms of this Order.

(c) Post at its M Street plant in Philadelphia, Pennsylvania, the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 4 of the Board, after being duly signed by Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against employees because they are shop stewards or other union representatives or for filing charges or lodging complaints with NLRB, OSHA, or EEOC.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their right to engage in protected concerted activities, and other rights under the Act.

WE WILL reinstate and make whole James P. Moran for loss of earnings since his discharge, with interest.

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[6] In the event that this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."